V. Ratnam, J.

Venkatachala Mudaliar v. Balambal.

18th September, 1984.

C. R. P. No. 2121 of 1984.

(A) *Tamil Nadu Debt Relief Act (40 of 1979), section 17—Amount due under a promissory note—Application for declaration of the same ordered— Costs awarded—Inclusion of counsel's fee—Whether can be fixed as in the case of original suit—Fee to be fixed indicated.*

(B) *Civil Procedure Code (V of 1908), section 35—Applicability.*

Held:—The declaration passed by the Courts under section 17 (4) (*a*) or (*b*) of Act 40 of 1979 affects the rights of parties and that is why those orders have been made appealable but not an order under section 17 (5) of the Act which merely enables the creditor to obtain on the strength of the declaration a decree with a view to recover the amounts declared due from the debtor. In this case there is no dispute that that the amount due to the respondent had been declared and the respondent had also paid the court-fee thereon and under the terms of section 6 of the Act, the petitioner was bound to pay the Court-fee also, in addition to the amount decreed in favour of the respondents.

No doubt section 17 (7) of the Act speaks of costs ordered to be paid under section 17 (6) of the Act and this would, ordinarily take in the Court fee paid by the creditor to get a decree for the amount declared due. However, there is absolutely no indication whatever in section 17 (7) of the Act that counsel's fee is totally excluded or that the Court cannot award any reasonable fee to counsel, having regard to the contest in the proceedings. The provision under section 17 (8) of the Act relating to the applicability of the procedure in the Code of Civil Procedure would attract section 35 of the Code and would enable the Court to award costs in a proceeding arising under section 17 of the Act, though such cases have not been specifically referred to and provided for in that section. There is also no indication in the provisions of the Act that counsel's fees normally forming part of the costs, should be totally excluded in adjudicating an application under section 17 of the Act. In the absence of any such provision in the Act the costs of the proceedings should be in the discretion of the Court and the Court ordinarily has power to determine by whom and to what extent the costs are to be paid. In the absence of any specific provision in the Act, the procedure under section 35, Civil Procedure Code, relating to award of costs along with the Legal Practitioners Fees Rules would apply and the counsel's fee could be provided for and allowed even in proceedings under section 17 of the Act, though not in the scale of a contested suit. On a perusal of the Legal Practitioners Fees Rules, 1973, it would appear that Rule 7 (2) would cover the case of an application arising under section 17 of the Act Though that rule contemplates proceedingins under section 47, Civil Procedure Code, yet, in view of section 25 of the Act, equating the effect of an order under section 17 (4) and (*b*) of the Act to an adjudication relating to the execution, satisfaction or discharge of a decree within the meaning of section 47, Civil Procedure Code, Rule 7 (2) of the Legal Practitioners Fees Rules, 1973, can be applied to proceedings under section 17 of the Act, in which case the minimum fee and maximum fee in a Munsif's Court shall be Rs. 15 and Rs. 75 and the minimum fee and the maximum fee in a Sub-Court or a District Court shall be Rs. 25 and Rs. 250 respectively. Since in the course of adjudicating upon the amount due by the debtor to the creditor or even in recording a finding regarding the discharge of a debt, the the Court is obliged to try the application almost as if it were a suit in the sense that oral as well as documentary evidence on both sides is recorded and received and arguments are heard in support of the rival contentions as in a suit, the question of including the counsel's fee as part of the costs in an application under section 17 of

the Act has to be viewed with certain liberality which would favour the award of a reasonable fee as counsel's fee rather than with stringency resulting in almost a negligible amount being awarded by way of counsel's fee. Considering this, it would meet the ends of justice, if the counsel's fee in an application under section 17 of the Act is fixed at the higher figure of Rs. 75 in so far as the Munsif's Court is concerned and Rs. 250 in a Sub-Court or a District Court as the case may be.

S. V. Jayaraman and *N. Mani Narayanan*, for Petitioner.

V. Shyamalam and *K. Sampath*, for Respondent.

R. S. —— *Petition allowed in part.*

S. Nainar Sundaram, J.

Ponnusamy Pandaram v.

Salem Jilla Vaiyappamalai Janagamar Sangam.

18th September, 1984

C. R. P. No. 3295 of 1984.

(A) *Civil Procedure Code (V of 1908), section 115— Appointment of a Commissioner for local inspection —Application dismissed—Revision against that order — Whether maintainable.*

(B) *Civil Procedure Code (V of 1908), Order 26, rule 9—Scope and applicability.*

(C) *Words and Phrases —"Case decided"——What is.*

A local investigation is the best way to find out the position and a party, namely, the third defendant coveting to placc the evidence before the Court through local investigation by a Commissioner cannot be shut out of that right. A misconception has weighed in the mind of the Court below when it reasoned that there is no disputc about the ownership of the survey number by the third defendant. That is not the point in issue. Shutting out the evidence which a party is entitled to place befory Court to substantiate his case, definitele decides the right of the party, adversely against him and in this view, the order passed by the Court below is a "case decided" and apart from that, on merits the order passed by the Court below comes within the mischief of the ratio adumbrated in section 115 of the Civil Procedure Code. There has been a failure to exercise jurisdiction vested in it by the Court below on a patent misconception of the position and this obliges an interference in revision.

D. Ramalingam, for Petitioner.

K. Sarvabhauman, for Respondent.

R. S. —— *Civil revision petition allowed.*

M. A. Sather Sayeed, J.

Jayabaratham & Co. v.

Susila Chari.

25th September, 1984.

C. R. P. No. 1404 of 1984.

(A) *Tamil Nadu City Tenants' Protection Act (III of 1922), section 9—Delay in filing application under section 9—No proof that delay was not intentional—Application dismissed.*

(B) *Limitation Act (XXXVI of 1963) section 5— Applicability of section to the Madras City Tenant's Protection Act.*

The Supreme Court in *Mangu Ram v. Municipal Corporation of Delhi, (*1976) 1 S. C. J. 237 : (1976) M. L. J. (Crl.) 206: A. I. R. 1976 S. C. 105 has observed as follows:

There is an important departure made by the Limitation Act, 1963, is so far as the provision contained in section 29, sub-section (2) is concerned. Since under the Limitation Act, 1963, section 5 is specifically made applicable by section 29, sub-section (2) it can be availed of for the purpose of extending the period of limitation prescribed by a special or local law if the

applicant can show that he had sufficient cause for not presenting the application within the period of limitation. It is only if the special or local law expressly excludes the applicability of section 5, that it would stand displaced. In view of the decision of the Supreme Court and the decisions of our Court it has to be held that a petition under section 5 of the Limitation Act, 1963, is not barred to seek condonation of the delay in filing the petition under section 9 (1) of the Madras City Tenants' Protection Act. Another question is, whether the petitioner has placed relevant materials before the Court to come to the conclusion that the delay of 55 days in filing the petition under section 9 (1) of the Act, has to be condoned under section 5 of the Limitatiou Act, 1963. The petitioner in his affidavit states that he contacted his counsel and the counsel told him that he has to take out an application under section 9 within thirty days from the date of service of the summons. The petitioner instructed his counsel to prepare such a petition. But the counsel to whom instructions have been given, had not been examined nor the petitioner himself was examined before the trial Court to prove as to how he was prevented from filing the petition within time as required under section 9 (1) of the Act. The petitioner has not gone into the witness box nor has he proved or satisfactorily explained as to when he left Madras on business tour to Belgaum and Mysore and when and on what day or date returned in March 1982 from such tour. The petitioner has also not satisfactorily explained that after the receipt of summons on 20th January, 1982, why he was keeping silent fot such a, long time in not filing the petition under section 9 (1) of the Act. Though the petitioner has averred that be was suffering from jaundice, it is not mentioned in the affidavit as to where and under whom he was undergoing treatment. No medical certificate has been filed in Court or marked as an exhibit nor is there any such medical certificate in the case bundle of the Court showing that the petitioner was suffering from jaundice. A reading of the affidavit filed by the petitioner clearly shows that there are no *bona fides* in the petition and the petitioner has not satisfactorily proved, that the delay in filing he petition was not intentional, but due to reasons beyond his control. No evidence of any sort was adduced or placed before the trial Court to come to the conclusion that the petitioner had sufficient cause in not filing the petition under section 9 (1) of the Act within thirty days from the date of receipt of suit summons. The trial Court has gone into this aspect and has rightly come to the conclusion that the petitioner has not established that there is sufficient cause for condoning the delay of 55 days. There is no flaw in law committed by the trial Court to warrant interference in this revision.

The Advocate General for *Mr. A. S. A. Tajuddin,* for Petitioner.

K. C. Rajappa, for Respodnent.

——— *Petition dismissed.*

P. R. Gokulakrishnan, J.

State of Tamil Nadu v.

Union of India.

17th November, 1984

S. A. No. 2117 of 1979.

(A) *Railways Act (IX of 1890), section 80 —Loss of and damage to goods sent by train —Suit for recovery of compensation — Maintainability.*

(B) *Constitutian of India (1950), Asticle 137—Applicability,*

The plaintiff appellant filed a suit for recovery of a sum of Rs. 3,320.45 as damages from the respondent. The case of the plaintiff was that out of 270 bags of nilon intended to be delivered at Dharmapuri District the Railway administration has delivered only 267 bags and that too in a damaged condition. Calculating the damages for short delivery and also the damages caused to the delivered goods, a sum of Rs. 3,520.45 was claimed by the plaintiff. A preliminary objection was taken by the respondent defendant stating that in view of the provisions contained in Article 137 of the Constitution the trial Court had no jurisdiction to try the suit. Following

the decision reported in *State of Kerala* v. *The General Manager, Southern Railway*, (1977) 1 M. L. J. (S. C.) 60 : (1977) 1 An. W. R. (S. C.) 60 : (1977) 1 S. C. J. 290 : (1977) 1 S. C. R. 419 : (1976) 4 S. C. C. 265: A. I. R. 1976 S. C. 2538 the trial Court held that the suit was not maintainable. On appeal, the lower appellate Court concurred with the findings of the trial Court and dismissed the appeal. A second appeal was filed by the plaintiff.

Held. It was held by the Supreme Court in *Union of India* v. *State of Rajasthan*, A. I. R. 1984 S. C. 1675 that under section 80 of the Indian Railways' Act, 1890 the claim made under the Act was essentially against the Railway Administration concerned. The Union of India was impleaded as a party to such suits being the owner of the Indian Railways by virtue of Article 300 of the Constitution. The statute, however treats the dispute as one between the Railway administration concerned and the persons instituting the suit. Neither of the parties to these proceedings is questioning the applicability of the provisions of the Indian Railways Act IX of 1890 to these proceedings. It is therefore difficult to hold that in these proceedings there is any question which falls within the scope of Article 137 of the Constitution.

In the Supreme Court case, the State of Rajasthan filed a suit in the Sub-Court, against the Union of India for recovery of compensation on account of the loss caused to the goods sent by the Indian Railways. The question was as to whether such a suit was maintainable under Article 137 of the Constitution of India. It was in that context, the above decision was given by the Supreme Court. On all fours, the said decision applies to the facts of the present case. In these circumstances, the judgment of the Courts below cannot be sustained.

S. Krishnaswami, Govt. Advocate, for *P. S. Srisailam*, for Railway, for Respondent.

R. S. —— *Second appeal allowed.*

M. A. Sathar Sayeed, J.

Alagappan v.

Rajaguru and Company.

20th September, 1984

C. R. P. No. 1153 of 1984.

Civil Procedure Code (V of 1908), Order 21, rules 37 and 38— Execution petition for arrest— Executing Court passing orders for arrest—Order silent about the means of the judgment-debtor to pay or wilfully evading to pay the decree amount—Order set aside on revision.

In this case, nothing is found in the impugned order that the judgment-debtor is having funds or that he is purposely delaying to pay the decretal amount under these circumstances the impugned order of the executing Court has to be set aside and it is accordingly set aside and the civil revision petition is allowed. The matter is remitted to the executing Court for fresh disposal. The executing Court after taking up the execution petition will issue notice to the parties and dispose of the matter after due enquiry according to law.

K. T. Palpandian, for Petitioner.

G. Germiah, for Respondent.

R. S. —— *Petition allowed.*

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